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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 560

ARNOLD CONSTABLE CORPORATION,
Petitioner,

v.

EUDOWOOD SHOPPING PLAZA, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

These proceedings stem from a suit by Respondent, as Landlord, against Petitioner-tenant, for money damages, alleging a breach of a long-term shopping center lease. The Superior Court of Baltimore City, on January 24, 1968, rendered a judgment in favor of Respondent and against Petitioner in the amount of $327,831.97, with interest and costs. Petitioner, on February 7, 1968, took an appeal from said judgment to the Court of Appeals of Maryland.

On February 26, 1968, Petitioner's counsel filed a Motion to Extend Time for transmitting the record to the Court

of Appeals, until April 5, 1968, and an Order thereon was issued simultaneously.

On April 2, 1968, Petitioner's counsel filed a second Motion to Extend Time for transmitting the record to the Court of Appeals of Maryland until May 10, 1968, and an Order to that effect was issued. Rule 825 a of the *Maryland Rules of Procedure* (1957 Ed. as amended) provides that the record on appeal shall be transmitted to the Court of Appeals within thirty (30) days after the first order for appeal is filed; the said rule also provides for extensions of time for such transmittal, but in no event may the lower court "extend the time to a day more than ninety (90) days from the date after the first Order for Appeal is filed . . .".

However, the said Order of April 2, 1968, prepared by Petitioner's counsel and filed in the Superior Court of Baltimore City, extending the time for transmittal of the record until May 10, 1968, did, in fact, extend the time for filing beyond the aforementioned ninety (90) day time limit.

"In reliance upon said Order", (See Appendix C, page 6a-9a, Petitioner's Brief), the Clerk of the lower court and Petitioner's counsel failed to have the record transmitted to the Court of Appeals until May 8, 1968, one day beyond the ninety (90) day time limit.

Petitioner filed the record with the lower court clerk on May 7, 1968, the day it was due at the Court of Appeals, and the clerk, obedient to the requirement as to time contained in the Order, forwarded the record so that it reached the Court of Appeals on May 8, 1968. The Court of Appeals noted that the record was received after the expiration of the time limitation for transmittal, and, on its own motion, dismissed the appeal on May 27, 1968.

Petitioner, contending that the failure to transmit the record within the prescribed ninety (90) day period was

due *solely* to the negligence, omission or inability of the lower court clerk, filed a motion to extend time with the Court of Appeals, attaching thereto affidavits of Frank L. Ensor, Assistant Chief Clerk of the Superior Court of Baltimore City and Cleaveland D. Miller, one of the Petitioner's attorneys. The Court of Appeals, on May 27, 1968, denied Petitioner's Motion, and thereafter Petitioner filed a Motion with the Court of Appeals to rescind the said Order of Dismissal, or, in the alternative, for a rehearing. On June 27, 1968, the Court of Appeals of Maryland likewise denied this Motion.

ARGUMENT

1. Petitioner contends that the action of the Maryland Court of Appeals in dismissing its Appeal, is a violation of one or both of the provisions of the Fourteenth Amendment to the Constitution of the United States, prohibiting the taking of private property without due process of law and guaranteeing equal protection of the laws. As stated by Petitioner in its brief, due process of law has been described as including equal protection of the laws, operating on all alike without discrimination. See *Duncan v. Missouri*, 152 U.S. 377, 382, 14 S. Ct. 570, 572 (1896). Respondent, therefore, in answer to both of these allegations, cumulatively denies that the action of the Court of Appeals of Maryland in any way violates any term of the Fourteenth Amendment to the Constitution of the United States.

Petitioner has not attacked the Maryland Rules of Procedure themselves, but rather the application thereof by the Court of Appeals in the instant proceedings. Petitioner, further, does not contend that the Maryland rule requiring the transmittal of the record on appeal to the Court of Appeals of Maryland within ninety (90) days after the

first order of appeal, is in itself discriminatory class legislation, that it is not sufficiently broad in scope, or that it is an unreasonable time limitation. As stated in *Pfeiffer Brewing Co. v. Bowles*, 146 F. 2d 1006, 1007, (Emer. Ct. App. 1945):

> ". . . [L]egislation must be general in character upon the subjects to which it is related and enforceable in the usual modes adapted to the facts in the case . . . Class legislation discriminating against some and favoring others is prohibitive . . . (but a law which) operates alike on all members of the class, is not special, discriminatory, or class legislation."

By virtue of Article IV, Section 18 of the Constitution of the State of Maryland, the Judges of the Court of Appeals of Maryland are *required* to promulgate rules and regulations for "prosecution of appeals to the appellate courts whereby they shall prescribe the periods within which appeals may be taken . . ."

Petitioner has neither alleged nor proven that the Maryland Rules of Procedure are discriminatory, or, in effect, class legislation; nor does Petitioner contend that other litigants in similar situations are not similarly required to transmit the record on appeal within a given time, in order to perfect such appeal. Petitioner's claim that it was not afforded equal protection under the law is wholly untenable and must fall for want of proof or even an allegation that it was subject to a rule to which others in the same class were not so bound. Petitioner has failed in this respect. See *Rinaldi v. Yeager*, 384 U.S. 305, 86 S. Ct. 1497 (1960).

Similarly, Petitioner's claim that it was deprived of its property without due process of law must fail. It has long been held that:

> ". . . [T]he Federal Constitution does not prevent the states from determining on due notice and oppor-

tunity to be heard, by what process legal rights may be asserted or legal obligations enforced." See *Gelfert v. National City Bank of New York*, 313 U.S. 221, 235, 61 S. Ct. 898, 903 (1941)."

Petitioner has failed to show that the Maryland Rules of Procedure, in and of themselves, denied to it due process of the law. Rather the Petitioner objects to the factual determination made by the Court of Appeals of Maryland that the delay in transmittal of the record on appeal was not solely caused by the negligence, omission or inability of the lower court clerk. It is clear that merely because a litigant is unsuccessful in a proceeding affecting its life, liberty or property, does not necessarily mean that there has been a violation of the constitutional guaranty of due process of the law. See *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 58 S. Ct. 185, 82 L. Ed. 268 (1937).

Respondent submits that due process does not require any specific or particular form or method of procedure, but merely guarantees the regular and orderly mode of procedure by due course of law. See *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 58 S. Ct. 904, 304 U.S. 333, 82 L. Ed. 1381 (1938), and *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 93 (1945).

Petitioner has failed to show that the aforementioned rule of the Court of Appeals of Maryland is a violation of any provision of the Fourteenth Amendment to the Constitution of the United States, and is therefore not entitled to a writ of certiorari based on such alleged violations.

2. The Court of Appeals of Maryland has fairly and reasonably applied the provisions of Rule 825 d of the Maryland Rules of Procedure to the facts of the instant case. The Petitioner contends, however, that the Court's

dismissal of Petitioner's appeal was unsupported by the evidence. Petitioner has failed to demonstrate that the failure to transmit the Record to the Court of Appeals within the time prescribed was solely the result of the negligence of the Court Clerk.

Rule 825 d of the Maryland Rules of Procedure (1957 Ed. as amended) provides:

> "An appeal shall not be dismissed because the record has not been transmitted within the time prescribed, if it appears to this Court that such delay was occasioned by the neglect, omission or inability of the clerk of the lower court, the court stenographer or appellee; provided, however, that such neglect, omission or inability *shall not be presumed but must be shown by the appellant.*" (Emphasis supplied.)

Petitioner erroneously believes that the "uncontroverted evidence" before the Court of Appeals required that body to hold that the delay was caused by the Clerk. However, from the affidavits attached to Petitioner's Motion to Extend Time filed with the Court of Appeals of Maryland, it is clear that the Clerk was not solely responsible, if he were responsible at all.

It is uncontroverted that the Petitioner prepared the Motion and Order Extending the Time for transmittal of the record on appeal to May 10, 1968, a date beyond the ninety (90) day time limit. Further, paragraph 10 of Frank L. Ensor's affidavit states, as follows:

> "The record in this case was not transmitted in a timely fashion to the Clerk of the Court of Appeals because of my belief that the deadline for filing the record was May 10, 1968 and not May 7, 1968."

The Court of Appeals of Maryland has had numerous opportunities to interpret the aforementioned rule. In

Steiner v. Harding, 88 Md. 343, 41 A. 799, 800 (1898) the Court said:

> "The prima facie evidence requiring the court, under its rules to dismiss an appeal, is furnished when the fact appears that more than three months have elapsed between the date of the transmission of the record; and this prima facie evidence must be rebutted and overcome by appellant. He can overcome its effect by showing that the delay was due — first, to the neglect; second, to the omission, or third, to the inability of the clerk. If he fails to establish at least one of these exculpatory circumstances, there is no discretion given this court to entertain the appeal, and the Appellee's right to have it dismissed, secured as it is by the positive terms of the rule, becomes fixed and indefeasible. The rule has the binding force of a statute; and its observance is obligatory on this Court."

To the same effect see *Miller v. Mencken*, 124 Md. 673, 93 A. 219 (1915), wherein, the Court further held that the Appellee need not offer any proof, if the Appellant has failed to discharge the burden of proof. The Maryland Court of Appeals has also held that the fact that the delay is only for one day has no bearing on the rule, for the application of the rule cannot be made to "depend upon a mere measurement of the extent to which it has been transgressed." See *Horseman v. Forbush*, 124 Md. 581, 93 A. 149, 151 (1915).

These same principles were only recently affirmed by the Maryland Court of Appeals in *Agnoli v. Powers*, 235 Md. 289, 201 A. 2d 487 (1964), and *State Roads Commission v. Maryland Materials, Inc.*, 237 Md. 621, 205 A. 2d 796 (1965).

It is clear from the authorities above cited that Petitioner must affirmatively prove that the delay in transmittal was caused solely by the negligence, omission or inability of the Clerk. There is no evidence in the record which could logically support Petitioner's allegations.

Moreover, it has been held recently that an Order of a lower court, purportedly extending the time for filing the record on appeal beyond the number of days permitted by statute is null and void, and an appeal filed based on such order will be dismissed. See *First Finance Company v. Ross*, 211 N.E. 2d 588, 64 Ill. App. 2d 474 (1965), and *Ramsay v. Boland*, 364 P. 2d 824 (Wyo., 1961).

Following these decisions to their logical conclusions, Petitioner's failure to transmit the record on appeal to the Court of Appeals could not possibly be blamed on the lower court clerk.

The said Order of court dated April 2, 1968, extending the time for filing the record beyond the ninety (90) day limit being a nullity, the Petitioner's brief was therefore due at the Court of Appeals on April 5, 1968, and the alleged error of the clerk in May of 1968 is meaningless.

In either event, whether Petitioner's brief was due on April 5, 1968 or May 7, 1968, Respondent submits that in no way can the delay be due to the lower court clerk's negligence, but rather the Petitioner must bear the full responsibility and ultimately the consequences of the illegal and improper order obtained by Petitioner.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the Court of Appeals of Maryland should be denied.

Respectfully submitted,

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STEIN, ABRAMS & ROSEN,
Of Counsel.